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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,

Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS AS MOOT

G. Stephen Parker*
Deborah A. Ausburn
Joshua R. Kenyon
Southeastern Legal Foundation, Inc.
2900 Chamblee-Tucker Rd., Bldg. 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Petitioner
* Counsel of Record

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STATEMENT OF FACTS

Petitioner, Northeastern Florida Chapter of the Associated General Contractors of America [hereinafter "AGC"], is an association of persons and firms in the construction industry doing business in Jacksonville and Duval County, Florida. Petitioner brought this suit on April 4, 1989, pursuant to 42 U.S.C. § 1983, challenging, both facially and as applied, the Minority Business Enterprise Programs administered by the City of Jacksonville [hereinafter "the City"][1]. Complaint, Record Vol. 1, Doc. 1 ["R-1-1"], ¶¶ 1, 50-51; Joint Appendix at JA-8, 19.

The ordinance set aside 10% of all city contracts for minority business enterprises. Jacksonville Purchasing Code ["City Code"] § 126.604 (1988) (capital improvements contracts), § 126.605 (other contracts); R-1-5, Exh. A; Petition Appendix at App. 15-21. The district court found the ordinance to be unconstitutional, R-3-69, Appendix to the Petition for Writ of Certiorari ["Petition Appendix"] at App. 7-13, and the City appealed. R-3-78.

The Eleventh Circuit Court of Appeals did not reach the merits of the City's program, but ordered the case dismissed without prejudice for lack of standing. *Northeastern Florida Chapter v. City of Jacksonville*, 951 F.2d 1217 (11th Cir.), *cert. granted*, 113 S.Ct. 50 (1992); R-4-81; Petition Appendix at App. 6. The court held that AGC lacked standing because it had not

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[1] AGC also named as defendants the Duval County School Board and its Chairman. After the district court enjoined enforcement of the programs, the school board suspended its programs and has not been a party to any of the subsequent proceedings.

shown "that, but for the [MBE] program, any AGC member would have bid successfully for any of [the City's] contracts." *Id.*, 951 F.2d at 1219; Petition Appendix at App. 5.

AGC filed a Petition for Writ of Certiorari, and this Court granted certiorari on October 5, 1992. The question presented to this Court in Petitioner's brief on the merits is whether

> an association challenging a racially exclusive government ordinance may establish standing by showing that its members are treated unequally in the bidding process for certain municipal contracts, or whether the association must show that its members actually would have received one or more of those contracts absent the ordinance?

Brief of Petitioner, p. i.

On October 28, 1992, little more than three weeks after this Court granted certiorari, the City of Jacksonville revised its ordinance. The new version of the MBE program is not substantially different from the old. First, the City has narrowed the program to include only African-Americans and women. City Code §126.601 (1992), Appendix to Respondents' Motion to Dismiss as Moot ["Motion to Dismiss"], p. A-7. The City also adjusted the original ordinance's requirement that 10% of city contracts go to minority businesses. City Code § 126.603, § 126.605 (1988), R-1-5, Exh. A, Petition Appendix at App.15 & 18. The revised version slightly reduces the percentage of minority preferences to 5% and 8% of all capital improvement contracts, City Code §126.604 (a)(1) (1992), Motion to Dismiss, p. A-15, 9% of contractual supplies and services contracts, *id.* §126.604(a)(2), and 6% to 7% of all professional services contracts. *Id.*, §126.604(a)(3). For fiscal year 1992 the

percentages are the same, except that the goal for capital improvements is 16% and 9%. *Id.*, §126.604(b)(1).

The original ordinance was straightforward, simply setting aside city contracts for minorities. City Code § 126.603, § 126.605 (1988), R-1-5, Exh. A, Petition Appendix at App.15 & 18. The new version of the City's preference program retains the set-aside feature and adds four other ways that the City can reach its goals of minority participation. City Code § 126.605 (1992), Motion to Dismiss, pp. A-20-30. The methods from which the City can choose are: (1) the Participation Percentage Plan, *id.*, § 126.605(a); (2) the Sheltered Market Plan, *id.*, § 126.605(b); (3) the Direct Negotiation Plan, *id.*, § 126.605(c); (4) the Bid Preference Plan, *id.*, § 126.605(d); and (5) the Impact Plan, *id.*, § 126.618, Motion to Dismiss, pp. A-63-75.

The Participation Percentage allows the City to require minority subcontracting participation for particular projects. *Id.*, § 126.605(a), Motion to Dismiss, p. A-21. African-American and women-owned firms retain an advantage over other contractors because a minority firm "may meet the set participation percentages for the respective classifications by applying its dollar value excluding noncertified [non-minority] Business Enterprise subcontractors under the award." *Id.*, Motion to Dismiss, p. A-22.

The Sheltered Market Plan is another name for set-asides. This plan allows the City to designate certain projects "for the exclusive competition of certified African-American and Women's Business Enterprises." *Id.*, § 126.605(b). Motion to Dismiss, p. A-26.

When the City utilizes the Direct Negotiation Plan, it need not even submit the project for bids. Rather, the City commences

"direct negotiations with certified African-American or Women's Business Enterprises." *Id.*, § 126.605(c), Motion to Dismiss, p. A-27. The City may avoid the bidding process only for professional service contracts less than $50,000.00. *Id.*

When the City uses the Bid Preference Plan, it specifies preferences of "up to five percent (5%) and not more than Five Thousand Dollars ($5,000)" for minority firms. *Id.*, § 126.605(d), Motion to Dismiss, p. A-28. For these contracts, the City must award the contract "to the lowest responsible bidder or to the [minority] enterprise whose bid is within the percentage or dollar amount of the lowest responsible bid." *Id.*

The Impact Plan grants unspecified point values to bidders who are minority firms or assist minorities in specified ways. *Id.*, § 126.618(1), Motion to Dismiss, pp. A-64-65. These values are factored into the bid price to obtain a "value cost" for each bid. *Id.*, § 126.618(2), Motion to Dismiss, p. A-66. A City Committee will then evaluate the bids and recommend the "lowest and best responsive and responsible evaluated bid." *Id.*, § 126.618(5) Motion to Dismiss, p. A-68. The plan grants a maximum bid preference of 15% above the "total price of the lowest responsive, responsible bid or proposal." *Id.*, § 126.618 (6).

This revised version of the City's preferences in municipal contracts is the subject of Respondents' Motion to Dismiss as Moot. Petitioner submits this response in accordance with Rule 21 of the Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The City's revision of its minority participation ordinance does not affect the question upon which this Court granted certiorari -- whether AGC has standing to challenge the City's system of minority preferences. The latest version of the ordinance does not remove the unequal burdens placed on non-minority contractors and does not change the allegations upon which AGC bases its standing to challenge those unequal burdens. Furthermore, the fact that the City has voluntarily changed its unconstitutional behavior does not make AGC's challenge to its program moot. Finally, the issue of standing to contest preferences in government contracts will recur, involving these same two parties, and prevents the current case from becoming moot.

ARGUMENT

Although in many situations the amendment of a statute will render a case moot, this is not such a case. A legislature cannot avoid judicial review by making technical changes in a statutory scheme, particularly where, as in this case, the legislature makes its changes three weeks after this Court granted certiorari. So long as the same issues remain in controversy between the same parties, this Court will not allow one party to unilaterally avoid resolution of those issues.

I. The Revised Ordinance Is No Different from the Original in Regard to AGC's Standing to Challenge It.

The revisions in the City's system of minority preferences do not affect the issue on which this Court granted certiorari -- the standing of contractors to challenge unequal treatment in government contracting. As explained in the Brief of Petitioner, the issue before this Court is how federal courts define "injury-in-fact" when determining standing in equal protection cases. The City defends the Eleventh Circuit's rule that defines injury only as a specific type of economic harm -- loss of a specific contract. AGC, however, has urged this Court to follow its long-standing precedent in equal protection cases and define injury as unequal treatment in bidding for government contracts. That issue remains alive in this case; the October, 1992 revision does nothing to resolve or neutralize it.

The City misconstrues the mootness analysis as whether AGC will be subjected again to the old ordinance. The correct question, however, is not which version of its preferences the City will apply, but whether "these same parties are likely to find themselves again in dispute over *the issues raised in this petition.*" *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (emphasis added). *See also*, *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 6 (1986) (challenge to already-expired court order was not moot where it was likely that newspaper would be subjected to similar order in the future); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976).

The issue in this petition is whether AGC has standing, absent evidence of a specific lost contract, to challenge the City's preferences in government contracting. That issue remains a live controversy between these parties so long as the City grants such preferences.

The City has not completely replaced its statutory scheme for granting preferences to certain contractors. *Cf.*, *U.S. Brewers Ass'n, Inc. v. Rodriguez*, 465 U.S. 1093 (1984); *Kremens v. Bartley*, 431 U.S. 119 (1977). It has only modified certain aspects of its minority business policy. Although the percentages have changed slightly, it is still clear that for some contracts the City will treat non-minority businesses differently than minority firms. "The substance of the statutory and regulatory complex remains," *Keyishian v. Board of Regents of Univ. of State of New York*, 385 U.S. 589, 596 (1967), as a "continuing and brooding presence [that] casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974).

The fact that the City now phrases its objectives as "goals" is not a substantive change in the law. A "semantic distinction is beside the point . . . Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status." *Regents of University of California v. Bakke*, 438 U.S. 265, 289 (1978). Furthermore, these "goals" are "far more than merely a hope, a wish or an aspiration." *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 423 (D.C. Cir. 1992). The City has no more discretion under the October, 1992 revision to ignore its "goals" than it did with the original program. *See, e.g.*, City Code § 126.618(4) (1992), Motion to Dismiss at p. A-67-68. ("In the event the Impact Plan is not achieving the

Participation Goals, then the Chief may adjust the relative weighted point values for each of the impact criteria"). The City still must award a certain amount of contracts according to racial and gender classifications.

The City also has retained methods of meeting its goals that treat contractors differently according to their race. All five of the City's alternative plans mandate the same sort of unequal treatment that AGC challenged originally. The City disingenuously claims that "all bidders are permitted to compete for City contracting." Motion to Dismiss, p. 11. Certainly AGC members can bid. They simply will not be considered for certain contracts. City Code §126.605(a) (1992), Motion to Dismiss at A-21 (under Participation Percentage Plan, contract awarded to bid that "meets the set participation percentages" or to low bidder who has made good faith efforts to meet percentages); -605(b), Motion to Dismiss at A-26 (Sheltered Market Plan; certain contracts "for exclusive competition of" minority firms); -605(c), Motion to Dismiss at A-27 (Direct Negotiation Plan; City commences "direct negotiations" with minority firms without accepting bids); -605(d), Motion to Dismiss at A-28 (Bid Preference Plan; contract awarded to bid "within the percentage or dollar amount of the lowest responsible bid").

Insofar as standing is concerned, then, the two ordinances do not differ. AGC non-minority members still will be unable to compete equally for those contracts designated for preferential treatment. It is an "objectively unequal bidding process" that injures non-minority firms every time they place a bid. *Coral Construction Co. v. King County*, 941 F.2d 910, 930 (9th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 875 (1992). Standing remains a live controversy between AGC and the City of

Jacksonville under either the old ordinance or its latest incarnation.

The fact that standing remains an issue under whatever statute the City prefers is illustrated by the treatment of this question in various federal courts. The Eleventh Circuit, for example, has applied its "specific lost contract" rule to cases involving both set-asides and subcontractor participation goals. *Cone Corp. v. Florida D.O.T.*, 921 F.2d 1190, 1196 (11th Cir.) (set-aside and subcontractor participation goals), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238 (1991); *S. J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 756 (11th Cir.) (subcontractor participation goals), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2274 (1991). Similarly, the other courts that have adopted the "specific contract" rule have not distinguished between set-asides and other types of MBE programs. *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1248-49 (4th Cir.) (subcontractor participation goals), *cert denied*, ___ U.S. ___, 112 S.Ct. 373 (1991); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 735 F.Supp. 1274, 1278-79 (E.D. Pa., 1990) (sheltered market and subcontractor participation goals), *aff'd in relevant part*, 945 F.2d 1260 (3d Cir. 1991); *Daley's Dump Truck Service, Inc. v. Kiewit Pacific Co.*, 759 F.Supp. 1498, 1499 (W.D. Wash., 1991) (subcontractor set-asides); *Michigan Road Builders Ass'n, Inc. v. Blanchard*, 761 F.Supp. 1303, 1305 (W.D. Mich., 1991) (set-aside program); *Underground Contractors Ass'n v. Metropolitan Water Reclamation District of Greater Chicago*, No. 90-C-3586 (N.D. Ill. 1991) (subcontractor participation goals).

The courts that have found sufficient injury in unequal consideration for government contracts also have applied the same criteria to different types of minority preference programs.

O'Donnell Construction Co., 963 F.2d at 422 (sheltered market for contractors and subcontractors); *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1403-04 (9th Cir. 1991) (set-asides and bid preferences), *cert. denied*, __ U.S. __, 112 S.Ct. 1670, (1992); *Coral Construction Co.*, 941 F.2d at 914 (bid preferences and subcontractor set-asides); *United Fence & Guard Rail v. Cuomo*, No. 88CV-306 (N.D. N.Y. Oct. 6, 1991) (subcontractor participation goals); *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, 130 F.R.D. 4, 6 (D.Conn. 1990) (set-asides). The specifics of a minority preference program, then, do not change the criteria for standing to challenge such a program. Whether the City enforces its original ordinance or the October, 1992 version, the issue on which this Court granted certiorari remains the same. *Cf.*, *National Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 393 n. 4 (1976) (case not moot because "there are assessments under the contested regulations awaiting enforcement and because the new regulations also do not provide a hearing unless one is requested").

The fact that the City, in an attempt to comply with *City of Richmond v. J.A. Croson, Inc.*, 488 U.S. 469 (1989), conducted a study before enacting the 1992 version of the ordinance does not make it a different statute insofar as this petition is concerned. The issue currently before this Court is not the merits of the original ordinance, but AGC's standing to challenge it. Any new or amended complaint that AGC would file to challenge the October, 1992 changes would contain the same allegations as its earlier complaint: (1) that AGC members "regularly bid on and perform construction work for the City of Jacksonville,"

Complaint ¶ 9, R-1-1, Joint Appendix at JA-10; (2) that the City has "set aside construction and procurement contracts and [has] restricted bidding on and awarding of such contracts to only [minority business enterprises]," *id.*, ¶ 45, R-1-1, Joint Appendix at JA-18; (3) that the City does not "have an adequate factual basis" for the program, *id.*, ¶ 32, R-1-1, Joint Appendix at JA-15; (4) that the percentage determined by the City "is not narrowly tailored to the elimination of any continuing effect of any prior discrimination," *id.*, ¶ 42, R-1-1, Joint Appendix at JA-17; and (5) that the minority set-asides and preferences deprive "numerous non-minority members of Plaintiff AGC of equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution by . . . discriminating against them on the basis of race." *Id.*, ¶ 50, R-1-1, Joint Appendix at JA-19. These allegations squarely present the issue of standing to this Court, no matter which version of preferences the City decides to use.

The City continues to place burdens on some contractors that it does not place on others. AGC's standing to challenge those burdens remains the same question under the original ordinance or the latest version. AGC has shown to this Court "an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest" in equal consideration for government contracts. *McCorkle*, 416 U.S. at 125-26. That policy has not changed, nor has the question to be decided by this Court.

II. The City's Voluntary Revision of the Original Statute Does Not Render This Controversy Moot.

The City's argument that AGC's petition is moot because the City revised its program confuses the merits of the ordinance with the issue of standing. The City in essence is claiming that because it has replaced its unconstitutional program with a constitutional one, AGC lacks standing to challenge either. The fact that the City claims to have changed its unconstitutional behavior, however, does not render moot the question of AGC's standing to challenge that behavior. The simple fact that a government voluntarily repeals a statute after a court challenge does not prevent a federal court from reviewing issues presented on appeal.

One example of this doctrine is *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). The plaintiff challenged a city ordinance that allowed the Chief of Police to deny licenses to applicants who had "connections with criminal elements." *Id.*, 455 U.S. at 285. The district court held that the phrase, even as defined in amended statutes, was unconstitutionally vague. *Id.*, 455 U.S. at 288. After this Court noted probable jurisdiction, the city eliminated the phrase entirely. *Id.*

Even though the challenged phrase no longer existed in the city's ordinances, this Court did not consider the case moot. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.*, 455 U.S. at 289. The Court considered the question of mootness in such circumstances to be "a matter relating to the exercise rather than the existence of judicial power." *Id.* Because of the real

possibility that the city would restore the language if this Court considered the case moot and dissolved the district court's injunction, *id.*, 455 U.S. at 289 n. 11, the Court decided to resolve the issue presented to it.

Similarly, the question of standing is not moot in the current case. The normal Article III principles underlying mootness do not control, *id.* at 289, and this Court can exercise its discretion to prevent the City from creating a moving target for those who would challenge its ordinances.

The City will continue to subject AGC members to unequal treatment based on the same criteria it used in 1989. In fact, unlike the city of Mesquite, Jacksonville did not even eliminate its statute. The City simply made some changes in its program. Given that fact, it is far from "absolutely clear" that the City would not continue in its wrongful behavior. *Vitek v. Jones*, 445 U.S. 480, 487 (1980). Not only is there a possibility that a finding of mootness would leave "[t]he defendant . . . free to return to his old ways," *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953), but the defendant in this case already has done so.

The City has not met its "heavy burden," *W. T. Grant*, 345 U.S. at 633, of showing that its October, 1992 ordinance has "completely and irrevocably eradicated the effects" of the old unconstitutional program. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). The City's claim that its behavior is now constitutional is merely an unsupported allegation and in any event is completely separate from the standing issue that this Court decided to hear. No court has ruled on the validity of the City's new program, and under the Eleventh Circuit rule no court will be able to do so until some fortunate plaintiff is able to show loss of a specific contract. Judicial review of the City's latest, or any

other, version of its race-conscious program of preferences cannot proceed until this Court determines the separate issue of who has standing to sue. The City's voluntary revision of its preferences program does not deprive this Court of jurisdiction to decide that issue.

III. The Issue of Standing to Challenge Preferences in Government Contracts Will Remain Alive Between the City and AGC.

In cases other than voluntary abandonment of a challenged policy, this Court has treated mootness as an aspect of Article III jurisdiction. *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990); *Sosna v. Iowa*, 419 U.S. 393 (1975). As in standing, the concern is that the parties have a continuing "personal stake" in the resolution of the case. *Lewis*, 110 S.Ct. at 1254 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

This Court long has recognized that a party can have a "personal stake" in the resolution of a particular issue, even though the outcome of the specific case may no longer be relevant. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973). In such cases, federal courts will rule on the merits of the issue presented to them.

In this case, there is a "reasonable expectation that the same complaining party [will] be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). All of the facts demonstrate that AGC members will bid for contracts awarded by the City of Jacksonville, and that the City will subject non-minority firms to unequal treatment in the bidding process.

In this case, there is much more than the requisite

"reasonable expectation" that the City will once again engage in the misconduct that AGC originally challenged. *Honig v. Doe*, 484 U.S. 305, 318 n. 6 (1988); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 775 (1978). The City has adjusted the formulation of its preferences, but it still grants preferences in municipal contracts to groups to which many AGC members do not belong.

Furthermore, the same parties will be involved in the continuing dispute over standing to challenge the City's preferences. *Burlington Northern Railroad Co.*, 481 U.S. at 436 n. 4; *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *McCorkle*, 416 U.S. 115 (1974). There is a "demonstrated probability," *Honig*, 484 U.S. at 318 n. 6, that AGC members, as contractors who "regularly bid on and perform construction work for the City of Jacksonville," Complaint ¶ 9, R-1-1, Joint Appendix at JA-10, will be subjected to the City's racial preferences. In fact, more AGC members will face unequal treatment under the revised ordinance than before. The 1992 ordinance excludes many groups, such as Spanish-speaking Americans, Orientals, and Native American Indians, who were defined as minorities in the old MBE plan. *Compare* Jacksonville City Code § 126.603 (1988), Petition Appendix at App. 15, *and* City Code § 126.603 (1992), Motion to Dismiss, pp. A-9 and A-14. Thus, some contractors who benefitted from the 1988 preferences will find themselves excluded from equal consideration by the revised version.

The probability that AGC members will bid for City contracts and be treated unequally is as reasonable as those expectations this Court has approved in other cases. *See, e.g.*, *Honig*, 484 U.S. at 317-321 (student likely to re-enter school system and be subjected to challenged educational policies);

Burlington Northern Railroad Co., 481 U.S. at 436 n.4 (parties "reasonably likely" to find themselves again involved in strike dispute); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 578 (1987) (plaintiff likely to submit new plans of operation; live issue remained whether state agency could enforce conditions placed on federal permit); *Press-Enterprise Co.*, 478 U.S. at 6 ("[i]t can reasonably be assumed" that newspaper would be subjected to order similar to the now-expired one it challenged); *Bellotti*, 435 U.S. at 775 (appellants "insist they will continue" opposition to income tax amendment; "no reason to believe" state will not enforce statute prohibiting contributions for such issues). The prospect of AGC's challenging the City's October, 1992 ordinance is a similarly reasonable expectation and distinct probability.

The vitality of the standing controversy is illustrated by the almost certain course of events should this Court find the instant petition to be moot. Whether AGC uses a new or amended complaint to challenge the revised ordinance, the district court will be obligated to dismiss the case for lack of standing. *Cone Corp.*, 921 F.2d 1190. *Northeastern Florida Chapter*, 951 F.2d 1217. The Eleventh Circuit will affirm that dismissal, *id*, and AGC once again will petition this Court to review the very issue that is before the Court now. That is, of course, unless the City revises its statute yet again and continues to avoid judicial review of the preferences it grants in municipal contracts.

As this scenario demonstrates, the original reasons that this Court granted certiorari still exist, no matter how the City adjusts its program. The federal courts will continue to adopt conflicting rules for standing to challenge programs such as the one in this case. The "specific contract" rule of the Eleventh Circuit will

continue to violate this Court's precedent regarding standing in equal protection cases. This Court considers carefully which issues are worthy of its attention, *Yee v. City of Escondido, Cal.*, __ U.S. __, 112 S.Ct. 1522, 1533 (1992), and the City should not be allowed to short-circuit the Court's review of the issue in this case.

Furthermore, it is far from clear that the City's revision of its ordinance moots the relief that AGC won in the district court. The injunction that the district court issued left the City free "to enact legislation it so deems advisable, and, *complies with the constitutional mandates* of *Croson* and *Fullilove*." Order Granting Plaintiff's Motion for Summary Judgment, R-3-69; Petition Appendix at App.13 (emphasis added). There is no evidence that the City's revised ordinance complies with constitutional standards, and such a discussion would not be appropriate for review by this Court on this petition. The proper procedure would be for either the City or AGC to petition the district court to determine whether the revised ordinance complies with the court's injunction. *Cf.*, *Board of Education of Oklahoma City Public Schools v. Dowell*, ___ U.S. ___, 111 S.Ct. 630, 634 (1991) (parents of students filed motion to reopen school desegregation case); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 7 (1971) (parents petitioned court for further relief in light of new Court rulings). Such a possibility of further relief in the district court would be sufficient to prevent this case from becoming moot. *Cf.*, *Church of Scientology v. U.S.*, ___ S.Ct. ___, (Nov. 16, 1992) (No. 91-946) (case not moot because court could grant some degree of relief).

In this case, however, neither AGC nor the City can ask the district court to review the changed ordinance as subject to the original injunction. The district court, on instructions from the

Eleventh Circuit, has dismissed the case for lack of standing. R-4-82. Until this Court decides the issue on which it granted certiorari, AGC's standing to challenge the City's system of racial preferences, AGC cannot seek court review of the City's adjustments to its prior unconstitutional actions.

For the same reasons, it will not advance this case for the Court to remand the case for consideration of the impact of the 1992 revisions on AGC's original challenge. *See, e.g., Lewis*, 110 S.Ct. at 1256; *Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972). Because the district court has dismissed the case, it cannot consider mootness until this court decides the standing issue.

Standing is a live controversy between AGC and the City, and will continue until this Court approves or disapproves the Eleventh Circuit's "specific contract" rule. AGC has a personal stake in its current challenge that has continued beyond the change in the statute and will continue into the future.

If this Court decides to wait for another case to resolve the standing controversy, the lower courts will continue to split over the issue, even in cases that may be moot. The Fourth Circuit, for example, announced its standing rule in a case that it specifically held was moot. *Maryland Highway Contractors Ass'n, Inc.*, 933 F.2d 1246. The state replaced its challenged ordinance with new program that, based on a new study, narrowed the classes of minorities who would benefit from the program. "Most of the remaining provisions in the MBE statute were not changed by the new MBE law." *Id.*, 933 F.2d at 1249. The Fourth Circuit found the case to be moot, *id.* at 1250. Nevertheless, "because of the likelihood of a new attack upon the constitutionality of the present Maryland MBE statute," *id.*, the court elected to announce a new

rule for standing. *Cf.*, *Coral Construction Co.*, 941 F.2d 910, (amendments to MBE program did not render request for declaratory and injunctive relief moot). The U.S. Supreme Court is "at present the only Art. III court" that can decide the standing issue in cases such as the instant one "in such a way as to bind all other courts." *Honig*, 484 U.S. at 332 (Rehnquist, C.J., concurring).

AGC has suffered injury from Respondent's insistence on using preferences in awarding government contracts, and continues to suffer injury from the Eleventh Circuit's "specific contract" rule. The City's substitution of five methods of racial preferences for one does not deprive this Court of jurisdiction to decide AGC's standing to challenge the City's program. Federal courts should "beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *U.S. v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952). In this case, the City has resumed its program and should not succeed in continuing to avoid judicial review.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court deny Respondents' Motion to Dismiss as Moot and all relief requested therein.

Respectfully submitted,

G. Stephen Parker*
Deborah A. Ausburn
Joshua R. Kenyon
SOUTHEASTERN LEGAL
FOUNDATION, INC.
2900 Chamblee-Tucker Rd.,
Bldg. 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Petitioner

* Counsel of Record

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